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QUESTION PRESENTED

Is time spent waiting for deadhead transportation by a train crew, which has been relieved of all duties, time on duty within the meaning of the Hours of Service Act, 49 U.S.C. § 21103(b)?

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In the Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-1592

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
PETITIONERS,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE RAILROAD RESPONDENTS

STATEMENT OF THE CASE

The Hours of Service Act ("HSA"), originally enacted in 1907, limits the maximum number of hours that railroad employees can be continuously on duty while engaged in

the operation of a train.[1/] This case resulted from the 1992 decision of the Federal Railroad Administration ("FRA") to adopt a new nationwide interpretation of the HSA. This new interpretation reversed the 85-year practice under the HSA of *not* counting as time on duty any time that a train crew, which has reached the end of its tour of duty and has been relieved from all duties, may spend waiting for transportation back to a terminal. This 85-year history was a basis upon which the industry's operating and crew scheduling practices have developed.

The HSA currently limits the maximum hours that a train employee can be continuously on duty to twelve hours.[2/] 45 U.S.C. § 62(a) (recodified at 49 U.S.C. § 21103(a)).[3/] After reaching the maximum, an employee cannot again be engaged in the operation of a train until after receiving a statutorily required minimum rest period

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1/ The Railroad Respondents are the nine largest railroads in the United States, The Atchison, Topeka and Santa Fe Railway Co., Burlington Northern Railroad Company, CSX Transportation, Inc., Consolidated Rail Corp., Illinois Central Railroad Co., Norfolk Southern Railway Co., Norfolk and Western Railway Co., Southern Pacific Transportation Co. and Union Pacific Railroad Co.

2/ Prior to the 1969 amendment of the HSA, the maximum was 16 hours.

3/ At the time this litigation commenced, the HSA was codified at 45 U.S.C. §§ 61-65 (1988). Congress since recodified the HSA at 49 U.S.C. §§ 21101-07 as part of its recodification of federal transportation statutes. Pub. L. No. 103-272, 108 Stat. 745 (1994). Although the recodification changed some statutory language, Congress did not intend to make any substantive change to the HSA. H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993). In order to parallel the unions' brief, this brief will cite to the recodified version of the Act, unless the context requires otherwise.

of up to ten hours. Most train assignments are completed within the twelve-hour maximum. However, because of the many variables that affect train operations, a crew occasionally cannot reach its scheduled destination within twelve hours. J.A. 100. When it appears that a train crew will not be able to complete its assignment before reaching the maximum, the railroad instructs the crew to park the train at a safe location before reaching the twelve-hour limit. The crew is then released by the railroad from any further duties and, in the industry lingo, is considered a relieved or "expired" crew, *i.e.*, it cannot be given any further duties until after receiving the minimum hours of rest mandated by the statute. 49 U.S.C. § 21103(a). The relieved crew is transported, by taxi or company vehicle or by riding on a train (but not as the crew), to a terminal. J.A. 99-100, 114-15, 122-23. The transportation, by whatever means, of a relieved crew that is not engaged in train operation is referred to as "deadhead" transportation. A fresh crew is sent to continue the train's journey to its scheduled destination. The relieved crew may be instructed to wait for its deadhead transportation on the stopped train or at some nearby location, such as a restaurant. J.A. 100-01, 123-24. If there is a wait, the railroads try to minimize it as much as possible. J.A. 101, 115, 124.[4/]

From 1907 until amended in 1969, the HSA classified time as either on-duty or off-duty. Deadhead transportation was considered time off duty. The time

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4/ The train crew is still paid while waiting for deadhead transportation, even though it has no duties to perform. J.A. 104 (¶ 3); *see also, e.g., Hours of Service Act Amendments of 1969, Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 100 (1969) (testimony of W. S. McGuire) [hereinafter *1969 Hearings*].

spent waiting for deadhead transportation by an expired crew likewise was considered off-duty time. J.A. 98, 114, 118, 121; *Atchison, T. & S. F. Ry. v. Peña*, 44 F.3d 437, 444 (7th Cir. 1994) (en banc). Not only was the statutory maximum intended to foster safety, it also provided the railroads with the ability to utilize crews right up to the twelve-hour limit where the practicalities of railroading so required, without fear of violating the HSA. Because time waiting for deadhead transportation by a relieved crew did not count toward the statutory maximum, if it appeared that a crew would expire before completing its run, the railroad could instruct the crew to park the train and relieve the crew from any further duties before it reached the HSA limit. Railroads schedule thousands of train crews every day.[5/] By utilizing crews right up to the HSA limit when necessary and then relieving them from duty when the limit was reached, the railroads were able to apply the Act's requirements in a straightforward manner.

In 1969 the HSA was amended to add a third category of time into which the deadhead transportation of expired crews was placed. This period, which came to be known in the industry as "limbo time," counted toward neither the maximum time on-duty nor the minimum amount of rest. 45 U.S.C. § 61(b)(3)(C) (recodified at 49 U.S.C. § 21103(b)(4)). For nearly 23 years, from 1969 until the FRA's 1992 re-interpretation of the Act,[6/] time spent

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5/ For example, Burlington Northern alone utilizes on average more than 2000 different crews each day. J.A. 113 (¶ 4).

6/ The HSA was originally administered by the Interstate Commerce Commission ("ICC"). In 1966, Congress transferred all powers and duties related to the HSA to the Secretary of the then newly-created Department of Transportation. 49 U.S.C. § 1655(e)(2). The Secretary later delegated his authority to the FRA, an agency within Transportation. 49 C.F.R. § 1.49(d).

waiting for deadhead transportation by a relieved crew was treated like time spent in such deadhead transportation, *i.e.*, as limbo time. J.A. 99 (¶ 7), 103 (¶ 5), 114 (¶ 6), 118 (¶ 5). Treatment of waiting time as limbo time was consistent with its prior treatment as time off-duty. Either way, waiting time was not counted as time on duty attributable to the maximum hours of service.

This administrative treatment of time waiting for deadhead transportation by a relieved crew changed after the unions which represent most locomotive engineers, the Brotherhood of Locomotive Engineers ("BLE"), and most conductors and brakemen, the United Transportation Union ("UTU"), sued the FRA in 1990. The unions argued that this waiting time period should be time on duty rather than limbo time. In the first decision on this issue since the 1969 Amendments, the Ninth Circuit agreed in *United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992).

The Chief Counsel of the FRA advised the railroad industry by letter dated October 28, 1992 that the Ninth Circuit had rejected the FRA's longstanding interpretation of this waiting time as limbo time. J.A. 73. Although the FRA did "not agree with the court's rationale," the agency advised that, effective January 1, 1993, it nevertheless would apply the Ninth Circuit's holding nationwide "in the interest of uniform application of the Hours of Service Act." J.A. 75. The FRA therefore instructed railroads that henceforth they were to treat time waiting by a relieved crew for deadhead transportation as time on duty and report any waiting time beyond the 12-hour maximum as excess service under the HSA. By adopting this interpretation, the FRA made illegal the way railroads had been operating for more than 85 years. Failure to comply with the FRA's new interpretation would subject railroads to civil and criminal penalties, not only if they utilize

employees in excess of the maximum hours allowed by law, but also if they fail to keep records of such excess service, which are audited by the FRA.[7/]

The FRA soon thereafter issued memoranda to various railroads advising how the FRA's new statutory interpretation was to be applied. J.A. at 78-91.[8/] The memoranda expanded on the FRA's October 28, 1992 letter, stating, for example, that this "[w]aiting time ends when the expired crew ceases to be *the crew of the train*, which occurs when the transportation that will carry them back to their point of final release arrives." J.A. 79, 86. Under the FRA's new statutory interpretation, employees were deemed to be the "crew of the train" even if they unquestionably had been relieved of all duties by the railroad. Indeed, the FRA considered them still to be the crew of the train even if they had left the train and were waiting at a nearby cafe for their transportation back to the terminal, J.A. 86-87 (Ex. B), or if their relief crew had already departed with the train, J.A. 89 (Ex. G).

The FRA's new interpretation of the HSA caused the railroad industry severe operating difficulties and imposed

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7/ Violations of HSA are subject to civil and criminal penalties by virtue of 49 U.S.C. §§ 21301-04, 21311. The excess service of each member of a train crew, typically two or three employees, is considered by the FRA a separate violation. *Id.* § 21303(a)(1). Failure to report excess service constitutes a separate and additional violation. 49 C.F.R. §§ 228.19, 228.21 (1994).

8/ The Railroads filed their first petition for review on March 2, 1993, in the event that these memoranda would be construed as agency action. The Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972, changed the procedure for seeking judicial review of FRA actions under the HSA. Such actions had to be appealed within 60 days of final agency action to an appropriate circuit court of appeals. *See* 28 U.S.C. §§ 2342, 2344.

significant costs on it. In a petition filed with the FRA on March 26, 1993, the Railroad Respondents explained these problems and stated that there was no legal or factual basis for the FRA's new nationwide reinterpretation of the HSA. J.A. 125. The Railroads submitted affidavits of their operating officials explaining the historical application of the HSA to this waiting time and the adverse impact on railroad operating practices and service from the FRA's new interpretation. *See, e.g.*, J.A. at 99-100 (¶ 9); 105-06 (¶¶ 6-8); 116 (¶ 9); 119 (¶ 7); 122-23 (¶¶ 8-9).

The unions, which elected not to participate in the FRA proceedings on the Railroads' Petition and therefore submitted no counter-affidavits or argument,[9/] now claim in their brief to this Court that railroads can adjust to the new interpretation by implementing better advance planning and by having transportation ready to meet relieved crews. Pet. Br. at 7-8. The unrebutted affidavits of the Railroads showed, however, that the problems created by the new interpretation cannot be solved so easily. The many variables affecting train operations often do not allow trains to be stopped at locations easily accessible to the taxi cab or van sent to pick up the expired crew. Also, a derailment, weather-related or other unavoidable delay may have a ripple effect on several trains at once, causing all of their crews to expire under the HSA before reaching their destination. Transportation will not be immediately available to reach all those crews before the 12-hour limit, especially in rural areas where most railroad tracks are located. Even where deadhead transportation is readily available, further delays can cause the train crew to expire and park its train before reaching

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9/ The unions stood by mute, even though the Railroads served a copy of their petition to the FRA on the BLE and UTU, as well as on their attorney.

its intended rendezvous with the deadhead transportation vehicle. *See, e.g.*, J.A. 119 (¶ 7), 123 (¶ 9).

As explained, before the FRA re-interpreted the HSA, railroads could meet these kinds of daily contingencies with confidence that they would not violate the HSA. All a railroad had to do was stop the train and relieve its crew from duty. However, as a practical matter, railroads could no longer utilize crews up to the twelve-hour maximum allowed by Congress under the FRA's new interpretation. The requirement to build in additional time to allow for deadhead transportation to meet expired crews effectively reduced the maximum hours that crews could operate trains. The railroads already had to take into account whether a crew could complete its assignment within the twelve-hour limit. Now, they also had to try to relieve a crew sufficiently in advance of reaching that limit so that deadhead transportation could be contacted, dispatched and meet the relieved crew. J.A. 99-100, 105, 116, 119, 123.

On April 8, 1995, while the Railroads' Petition was pending at the FRA, the FRA published a *Federal Register* notice amending its HSA policy statement contained in the Code of Federal Regulations to reflect its new interpretation and enforcement policy regarding waiting time. J.A. 158-67. The FRA repeated that, while it did "not agree with [*Skinner*'s] legal rationale, we have decided to accept its decision and treat it as binding." J.A. 160. The FRA advised that "awaiting deadhead transportation will now constitute time on duty and FRA will enforce the Act accordingly . . . ." J.A. 161. The FRA also reminded affected parties that the civil penalties for violation of the HSA had been increased and that, not only railroads, but their officials and employees, were

subject to civil and criminal penalties for violations of the HSA. J.A. 164-65.[10/]

On May 19, 1993, the Railroads supplemented their Petition to advise that the FRA's new interpretation was resulting in many additional instances of service in excess of the statutory maximum. Despite the Railroads' efforts to comply with the new interpretation, they were simply unable to do so in all circumstances. J.A. 122-133. In the first three months of 1993 alone, after the FRA's new interpretation took effect, the Railroads reported more than twice the excess service under the HSA as they had for all of 1991 and 1992 combined. J.A. 128-129, 133. Even though these instances represented a relatively small number of the thousands of train crews utilized each day, the Railroads explained that the FRA's new interpretation exposed them to hundreds of thousands of dollars of liability.[11/] Again, the unions did not respond to the Railroads' Supplement or otherwise seek to participate before the FRA.

Because the FRA's *Federal Register* notice was the first formal agency action establishing a new nationwide interpretation of the HSA, and the FRA had not yet acted on the Railroads' Petition, the Railroads filed a protective petition for review of the FRA's amendment of its interpretative and enforcement policy on June 7, 1993. J.A. 168-73. The FRA eventually denied the Railroads' Petition on July 1, 1993. J.A. at 174-80. The Railroads appealed that denial within the 60-day period set forth in

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10/ Violations of the HSA are punishable by fines of up to $10,000 each; fines of up to $20,000 may be assessed for violations arising out of gross negligence or for a pattern of repeated violations. 49 U.S.C. § 21303.

11/ This potential liability has since increased into the millions of dollars.

28 U.S.C. § 2344, J.A. 181-86, and the Seventh Circuit consolidated the three appeals by orders issued June 24 and July 21, 1993. J.A. 22, 23.

A divided panel held that, although it would have decided the case differently were it writing on a clean slate, it felt compelled to follow the Ninth Circuit's decision. *Atchison, T. & S. F. Ry. v. Peña,* 29 F.3d 324 (7th Cir. 1994). The Seventh Circuit granted the Railroads' petition for rehearing en banc and reversed that panel decision. 44 F.3d 437 (7th Cir. 1994) (en banc). A unanimous court stated that, "[m]indful that the purpose of the Act and its amendments is safety in operating trains, we hold that time spent waiting for deadhead transportation is not time on duty, but limbo time." *Id.* at 443. In view of the Seventh Circuit's en banc decision, the FRA returned to its pre-*Skinner* application of the HSA, except in the Ninth Circuit. Only the unions still argue that time waiting for deadhead transportation by a crew, which has been relieved from all duties, should be counted as time on duty.

SUMMARY OF ARGUMENT

This case presents a single straightforward issue of statutory construction--whether the time spent waiting for deadhead transportation by a train crew, which has been relieved from all duties at the end of its tour of duty, should be counted as "limbo" time or as time on duty for purposes of the HSA. Contrary to the unions' extra-record arguments on brief, this case does not involve any issue where such a train crew has been given duties to perform while waiting on the train for deadhead transportation to arrive.

The Seventh Circuit's interpretation of this waiting time to be limbo time is clearly compelled by and is consistent

with the language and structure of the statute. The HSA defines "time on duty" as "[t]ime the employee is engaged in or connected with the movement of a train . . . ." 49 U.S.C. § 21103(b)(2). A train crew which has been relieved of all duties, will not again be called upon to operate a train until receiving the rest period mandated by the HSA, and is merely waiting for deadhead transportation to arrive is obviously no longer "engaged in or connected with the movement of a train." In contrast, the unions' suggested interpretation is contrary to the language and structure of the Act. Employees would be treated as on duty even when they unquestionably have no duties. Consequently, the hours of service that crews could be utilized would be effectively reduced below the maximum allowed by statute.

The Seventh Circuit's interpretation is also consistent with the safety purpose of the HSA. Treatment of waiting time, which the Railroads try to keep to a minimum, as limbo time does not extend the time that a crew can be continuously on duty; the statutory limit remains twelve hours. Once employees have been relieved at the end of their tour of duty, they cannot be given new duties until receiving the statutorily mandated rest period. Because time waiting for deadhead transportation, whatever its duration, also does not count as time off-duty, that rest period does not begin to run until after the expired crew reaches its terminal.

Contrary to the unions' argument, the Seventh Circuit's interpretation is consistent with the legislative history and consistent application of the HSA. That history shows that Congress has been mindful of the practical impact of the HSA on railroad operations. For that reason, Congress has refused proposals by these unions to amend the HSA so as to overturn the FRA's treatment of waiting time as time on duty and to further reduce the maximum hours of

service from twelve to ten hours. Yet, a reduction in the maximum limit would be the practical effect of the HSA interpretation urged by the unions here.

The Seventh Circuit's decision is also consistent with appellate decisions under the HSA, except for *Skinner*, which was wrongly decided. The decisions of this Court and other appellate courts show that a crew is considered on duty only if it is actually performing duties or has been temporarily released from duty in the midst of its tour, but may be recalled at any moment. Neither circumstance is presented here.

Finally, this case does not raise "a serious safety issue" as the unions argue. The unions' concern is that train crews work long and irregular shifts. Congress, however, has already determined that a twelve-hour maximum on duty time is not excessive, and irregular work patterns are not even regulated by the HSA. The unions' safety argument highlights that they are actually making policy arguments for amendment of the Act. Such arguments must be made to Congress, not this Court. In fact, the unions' brief is simply a repackaging, sometimes verbatim, of prepared 1991 congressional testimony in support of the same proposal for amendment of the HSA that they are seeking here.

For these reasons, the Court should reject the unions' arguments and affirm the Seventh Circuit's en banc decision.

ARGUMENT

I. The Seventh Circuit's Interpretation Is Compelled By The Language Of The Statute

As this Court has observed on many occasions, "'[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *see also, e.g., K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("[T]he court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Starting its analysis with the language and structure of the HSA, the Seventh Circuit found that "the statute itself resolves this issue quite clearly." *Peña*, 44 F.3d at 443.

A. The Seventh Circuit Correctly Analyzed The Statutory Language

The HSA achieves its safety purpose by limiting the maximum hours that a train crew can be continuously on duty to twelve hours. Section 21103(b)(2) of the HSA, defines "time on duty" as "[t]ime the employee is engaged in or connected with the movement of a train . . . ." The Act also defines certain interim rest periods, when the crew is still on call and which occur before a crew has been finally relieved from duty, as "time on duty." 49 U.S.C. § 21103(b)(5)-(7). Thus, the definition focuses on the time period when an employee is responsible for the movement of a train. It is during this time that the employee must be alert and attentive.

As the Seventh Circuit found, "[t]he crew's time spent waiting [for deadhead transportation] has absolutely no impact on its ability to operate trains." *Peña*, 44 F.3d at 444. Once a train crew has been relieved from any further train operating duties, has not been given any other duties by the railroad, and is merely waiting for deadhead transportation to its terminal, that crew cannot present a safety hazard. It is no longer "engaged in or connected with the movement of a train" and cannot be recalled to operate a train or perform any other duties until after receiving at least eight (or in some cases ten) continuous hours of rest. 49 U.S.C. § 21103(a). Therefore, this waiting time is not time on duty within the plain meaning of Section 21103(b).

The Seventh Circuit's treatment of time waiting for deadhead transportation from point of duty (*i.e.*, the train) to a terminal like the treatment of that deadhead transportation (*i.e.*, as limbo time) is also logical and consistent with the structure of the Act. Before 1969, all deadhead transportation, either to or from the point where an employee would assume train operating duties, was treated as off-duty. The unions proposed that all deadhead transportation be reclassified as time on duty. *See, e.g.*, *1969 Hearings* at 9 (testimony of Al Chesser). The railroad industry opposed this change, especially as it related to deadhead transportation from the point where the crew had been relieved of all duties, because of the operating problems this would create. In particular, railroads effectively would be precluded from utilizing crews up to the maximum limit (reduced to twelve hours by the 1969 Amendments) if deadhead transportation at the end of a tour of duty were counted toward that limit. *Id.* at 134-35 (testimony of R. R. Manion).

Congress legislated a compromise by treating deadhead transportation to a duty assignment as time on duty,

because that time could affect the employee's alertness once he or she reached the train the employee would operate. However, Congress chose not to count deadhead transportation after an employee had been relieved from duty as time on duty, because of the practical problems identified by the industry that such a rule would cause and the fact that the employee would not thereafter be involved in train operation until receiving the required rest period. Instead, Congress classified it as neither time on duty or off duty, *i.e.*, limbo time. 45 U.S.C § 61(b)(3)(C) (recodified at 49 U.S.C. § 21103(b)(4)). Treating time waiting for deadhead transportation as part of such transportation carries out this legislative compromise. This waiting time is like deadhead transportation, because the crew has been relieved from all duties. Conversely, counting it as time on duty creates the same kind of practical operating problems that Congress avoided by classifying deadhead transportation from point of duty as limbo time.

Furthermore, treating time waiting for deadhead transportation as time on duty is contrary to statutory language that time on duty is "[t]ime the employee is engaged in or connected with the movement of a train . . . ." 49 U.S.C. § 21103(b)(2). The unions' statutory interpretation looks solely at whether deadhead transportation has arrived, not at whether the expired crew has any duties. This approach creates the absurd result that the crew is deemed on duty even though it is no longer on the train and is waiting in a cafe, J.A. 86-87 (Ex. B) or the relief crew has taken the train away. J.A. 89 (Ex. G).

While the Seventh Circuit began its analysis with the language of the statute, the Ninth Circuit started with case law from the early part of this century, predating the 1969 Amendments by several decades. As the Seventh Circuit

found, and as explained *infra*, Part III, the Ninth Circuit erroneously interpreted this older case law to mean that all waiting time must be counted as time on duty. *Skinner*, 975 F.2d at 1426. This erroneous reading of case law in turn caused the Ninth Circuit to analyze incorrectly the statutory language. Starting from the false premise that before 1969 time waiting for deadhead transportation by a relieved crew was time on duty, the Ninth Circuit framed the statutory interpretation issue as whether Congress intended in the 1969 Amendments to change waiting time from time on-duty to limbo time. Of course it did not, because this time period was never considered time on duty in the first place.

B. The Statutory Provisions Relied Upon By The Unions Are Inapposite

The unions argue that other sections of the HSA require that waiting time by a relieved crew be considered time on duty. They cite Sections 21103(b)(5) and (7), which deal with interim rest periods, Section 21103(b)(3), which deals with commingled service, and Section 21103(b)(1), which states that "time on duty" ends "when the employee is finally released from duty." Pet. at 8-9. None of these sections supports the unions' construction of the HSA. Even the Ninth Circuit rejected similar arguments by these unions. *See, e.g., Skinner*, 975 F.2d at 1425.

An interim period available for rest is a different period than time in deadhead transportation from point of duty (or time waiting for such transportation), as illustrated by the fact that these time periods are treated by different provisions of the HSA. 49 U.S.C. § 21103(b)(5), (7) (interim periods), § 21103(b)(4) (limbo time). Interim rest periods, by definition, occur during a crew's tour of duty

before the railroad finally relieves the crew from duty.[12/] Occurring between periods of on-duty time, the crew remains subject to recall to resume train operations as soon as the interim period is over. Congress classified interim periods as time on duty because they did not afford employees an opportunity to rest before resuming duty. *See, e.g.*, S. Rep. No. 604, 91st Cong., 1st Sess. 7 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636. In contrast, time waiting for deadhead transportation occurs at the end of a crew's shift, when it has been finally relieved from all duties. The crew is no longer subject to recall until after receiving the statutorily required rest period.

Section 21103(b)(3) also is inapposite, because it only counts as time on duty "time spent performing any other service for the railroad carrier . . . ." That section codifies case law addressing the issue of "commingled service."[13/] Normally, time spent by an employee performing service for a railroad other than train operation, such as repairing freight cars or performing track maintenance, does not count as time on duty under the HSA. If an employee is asked to perform such duties during or after his tour of duty operating a train, the time spent doing "other service" is also treated as time on duty under the HSA.[14/] Otherwise, a railroad could work an

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12/ *Webster's New World Dictionary* defines "interim" as "the period of time between." *Id.* at 734 (2d ed. 1984).

13/ *See, e.g., San Pedro, L. A. & S. L. R.R. v. United States*, 212 F. 326 (8th Cir. 1914); *United States v. Missouri Pac. Ry.*, 206 F. 847 (D. Kan. 1913).

14/ The Senate Report on the 1969 Amendments explained that this section (formerly § 62(b)) was intended to address the commingled service issue, stating that when employees "primarily engaged in or connected with the movement of a train" perform

employee involved in train operations more than twelve consecutive hours. For example, a conductor could in a single day work six hours in train service, three hours driving a truck (*i.e.*, "other service"), and then six more hours in train service, or a total of 15 consecutive hours.

The unions provide no support for their contention that a crew member who has been relieved from all duties and is merely waiting for deadhead transportation is involved in "other service" within the meaning of the HSA. The Seventh Circuit was correct that such waiting by a crew with no duties is not "other service" and, therefore, not time on duty. *Peña*, 44 F.3d at 443 & n.4. The FRA itself has never considered this waiting time as "other service." For example, the FRA did not include waiting time as "other service" in its 1977 Statement of Policy and Interpretation on the HSA, where the FRA explained commingled service. 42 Fed. Reg. 27,594, 27,596 (1977). Indeed, only five months after publishing this interpretative statement, the FRA advised the UTU that waiting time was limbo time within the meaning of the HSA. J.A. 62-64. The FRA could not have taken this position if waiting time was "other service" which had to be counted as time on duty. Nor would counting such waiting time as other service advance the safety purpose of the Act, because while waiting the employee is no longer connected with the movement of the train.

The unions' argument that an employee is "finally released from duty," and therefore no longer on duty within the meaning of Section 21103(b)(1), only when the employee reaches his designated terminal also is without

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other services that are not subject to the HSA, "all such other service must be counted as time on duty." S. Rep. No. 604, 91st Cong., 1st Sess. 9 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1636, 1641.

merit. Even if time on duty otherwise continued until an employee reached his or her terminal, Section 21103(b)(4) provides that deadhead transportation from point of duty to place of final release is limbo time, and therefore not time on duty. Because time waiting for deadhead transportation is treated as part of that transportation, this waiting time is treated as limbo time even under the unions' construction of Section 21103(b)(1). In any event, as the Ninth Circuit recognized, the HSA does not define where an employee can be considered finally released from duty. *Skinner*, 975 F.2d at 1425. Once the railroad instructs an employee to cease all duties, the employee has been "finally released from duty" regardless of whether his train has reached a terminal.

C. The Unions Misrepresent The Record Evidence

The unions argue on brief that train crews are commonly given duties, within the meaning of the HSA, while they are waiting on a stopped train for their deadhead transportation to arrive, and, for this reason, waiting time must be counted as time on duty. *See* Pet. Br. at 5-6, 11, 28-29. Again without any record support, they also claim that the Railroads' operating rules require relieved train crews to perform additional duties. Pet. Br. at 28-29. These arguments are utterly baseless. In fact, the uncontested record evidence before the FRA and Seventh Circuit was that, once train crews are relieved from duty after reaching the maximum hours of service they have no further duties, period.[15/] Moreover, the

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15/ *See, e.g.*, J.A. 106 (¶ 8) ("Crews awaiting deadhead transportation are not working–they perform no railroad service."), 114 (¶ 7) ("Once an employee is relieved from duty, whether or not he has reached his maximum hours of duty under the HOSA, . . .

Railroads' instructions to employees are to comply with the HSA. *See, e.g.*, J.A. 105 (¶¶ 5-6).[16/] Thus, the FRA and Seventh Circuit were not presented with the "numerous fact patterns" hypothesized by counsel for the unions in their appellate briefs. Pet. Br. at 6. On the record of this case, the narrow issue before the FRA, Seventh Circuit, and now this Court, is whether time waiting for deadhead transportation by employees who have been relieved from all duties is time on duty.

Moreover, if circumstances arose where a railroad gave train operating employees additional duties, as alleged by the unions on brief, the waiting time issue would never arise. If an employee were given additional such duties, he or she would not in fact have been "finally released from duty" within the meaning of Section 21103(b)(1) and would still be on duty. Similarly, if given additional duties other than those connected with train operation, the employee would still be on duty, because he or she would be performing commingled service within the meaning of Section 21103(b)(3).

The fact that an employee remains subject to orders or supervision of the railroad after being relieved from duty also does not mean he or she is still on duty, as long as the employee is not ordered to perform service for the railroad within the meaning of the HSA. For example, the mere fact that, under standing railroad orders, an employee is prohibited from using drugs or alcohol while waiting on

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that employee no longer has any duties to perform in connection with the movement of a train or otherwise.").

16/ For this reason, there is also no basis for the unions' unsupported contention that employees, who have reached the maximum limit, are disciplined for failing to guard against vandalism. Pet. Br. at 14.

the train for deadhead transportation to arrive does not mean he is performing duties covered by the HSA.

II. The Seventh Circuit's Interpretation Is Required By The Legislative History And Consistent Application Of The HSA

Contrary to the unions' argument, the Seventh Circuit's statutory interpretation is fully consistent with, and is required by, the legislative history of the HSA and its amendments and the longstanding application of the HSA.

A. The 1969 Legislative History Confirms The Seventh Circuit's Interpretation

As originally enacted, the HSA did not expressly define its terms. Their meaning was supplied by interpretive statements of the ICC, which administered the Act until 1967, and court decisions. Although the ICC issued interpretative guidance on a number of issues under the HSA, none specified that time waiting for deadhead transportation was time on duty. J.A. 55-62. In fact, as shown by the affidavits of railroad officials, prior to the 1969 Amendments, this time period was consistently treated as off-duty time. The Railroads considered themselves in compliance with the HSA as long as they relieved a train crew before reaching the maximum limit, even if that crew had to wait thereafter for deadhead transportation to arrive.

Although crews only infrequently were required to wait for deadhead transportation after the maximum hours were reached, because of the sheer number of train assignments on the nation's railroads from 1907 to the 1969 Amendments, there were likely many thousands of instances where relieved crews were left waiting on a train

or elsewhere for deadhead transportation. Yet, in the entire 62-year history of the HSA before 1969, there is only one reported action, brought in the twilight of the ICC's administration of the Act, which claimed that this waiting time was time on-duty. *United States v. Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967).[17/] This district court decision was an aberration and not followed by the FRA or anyone else.[18/]

The congressional testimony by representatives of both labor and management on the 1969 proposals for amendments to the HSA confirmed the longstanding understanding that the HSA was not violated if a train crew, which had been relieved from all duties after reaching the maximum hours of service, was required to wait thereafter for deadhead transportation. The top official of the BLE testified that rail labor did not consider such waiting time as time on duty under the HSA in the following exchange with Representative Tiernan:

> Mr. Tiernan. . . . . Suppose the train is down the road, down the track 20 miles from the terminus and they get some difficulties in switching, or they get put aside, and it goes 15 or 15½ hours they are out on the job.
>
> The dispatcher has to send a station wagon or other equipment or tell them to take a taxi back into town; is that correct?

17/ The unions, Pet. Br. at 22, and Ninth Circuit, *Skinner*, 975 F.2d at 1427, erroneously state that this action was brought by the FRA.

18/ As we explain, *infra*, the District Court, like *Skinner*, misread early case law under the HSA.

Mr. Coughlin. They often do that; yes sir.

Mr. Tiernan. In other words, they have to get them off that equipment within the 16 hours?

Mr. Coughlin. No. No. In your example this train breaks down 20 miles from the final terminal and the man is there 16 hours. Many is the time that that man is liable to set there for 3 or 4 hours waiting for a car to come out and bring him in.

* * *

Mr. Tiernan. *There is no safety violation there, in the sense that the crew cannot operate after 16 hours?*

Mr. Coughlin. *That is correct.*

* * *

Mr. Coughlin. Let us take this example and if the carrier knows they cannot get you into your terminal within the 16 hours, *there is nothing to prevent the carrier from telling you to go off duty after you have been there 15 hours and 59 minutes. Then you can wait there for 2 or 3 or 4 hours waiting for some type of transportation back into your home terminal and they can call you within 8 hours after they have relieved you out on the road.*

1969 Hearings at 114-15 (testimony of Charles J. Coughlin) (emphasis added).[19/] Thus, one of the principal union witnesses testifying on behalf of union-sponsored legislation agreed that time waiting for deadhead transportation was not historically treated as time on duty.

Congress' understanding of the industry's practices, as explained in this and other testimony, also was made clear in the committee reports on the 1969 Amendments. For example, the House Report stated that "[i]n order to avoid a violation of the 16 hours maximum and the penalties which might accrue therefore, carriers were shown to have released employees a few minutes before the 16 hours expired whether or not such employee had reached his terminal." H.R. Rep. No. 469, 91st Cong., 1st Sess. 7 (1969). *Accord* S. Rep. No. 604, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S.C.C.A.N. 1639. Obviously, if time waiting for deadhead transportation counted as on duty time, a HSA violation would not be avoided merely by releasing a crew from duty right at the HSA limit. Thus, Congress clearly understood that the established rule in 1969 was that time waiting for deadhead transportation was considered off duty time.[20/]

19/ A wait of the duration presented in the above-hypothetical is not typical. *See, e.g.,* J.A. 115 (¶ 8).

20/ In contrast to congressional testimony that time waiting for deadhead transportation was not considered time on duty under the HSA, there was no testimony to the contrary or reference to the *Pennsylvania Railroad* decision. This was true, even thought the Chairman of the ICC testified at the 1966 hearings on the HSA and the Administrator of the FRA testified at the 1969 hearings. *See Hearings Before the Surface Transp. Subcomm. of the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 148 (1966) (testimony of Hon. John W. Bush); *1969 Hearings* at 257 (testimony of Hon. Reginald N. Whitman).

The unions attack the Seventh Circuit's interpretation of legislative history, citing the testimony of another union president, UTU President Al Chesser, and the testimony of two carrier officials, R. R. Manion and Albert M. Schonfield. Pet. Br. at 19-21. This testimony does not support the unions; to the contrary, it confirms the Seventh Circuit's view.

The unions argue the testimony of BLE Grand Chief Engineer Coughlin should be disregarded, because UTU President Chesser was testifying for "all of rail labor." Pet. Br. at 20. The unions apparently base this contention on the fact that Mr. Chesser was also Chairman of the Railway Labor Executives' Association. What the unions fail to mention is that only two labor organizations testified on the 1969 HSA amendments, the BLE for engineers and the UTU for other train service employees. As Mr. Chesser himself testified, the BLE at that time was not a member of the RLEA. *1969 Hearings* at 83. Thus, Mr. Coughlin, not Mr. Chesser, was speaking for the engineers union.

Moreover, a review of Mr. Chesser's testimony shows that it nowhere claimed that time waiting for deadhead transportation by an outlawed crew had been considered time on duty. Mr. Chesser's testimony was primarily concerned with the prior practice of treating deadhead transportation and certain interim rest periods as time off duty. *Id.* at 30. Mr. Chesser actually agreed that railroads could lawfully work employees right up to the maximum HSA limit, although it was his opinion that some railroads abused this right. *Id.* at 77.

The testimony cited by the unions as appearing at pages 99-100 of the 1969 Hearings was not even Chesser's, but that of a BLE official. That official agreed with Mr. Coughlin's testimony that a railroad did not violate the HSA if employees worked right up to the maximum limit

(then 16 hours) and then waited for deadhead transportation. For example, he testified:

> Management, *remaining within the law*, could inform the crew to relieve themselves; that is, cease the performance of any duties beyond the 16-hour limitation. Such a crew could find themselves miles from the nearest terminal and possibly have to wait for relief or transportation . . . .

Id. at 96-97 (emphasis added).

Contrary to the unions' mischaracterization, carrier officials did not testify that time waiting for deadhead transportation historically was treated as time on duty. In the excerpts of their testimony referenced by the unions, they were testifying to the practical operational problems that would result if the union-supported bill, H.R. 8449, were adopted. This is illustrated when the missing words from the unions' selective quote of Penn Central official Schonfield are restored:

> In the few cases where it is necessary, because of unusual and unforeseen circumstances, to relieve a crew short of its final terminal, *the present regulations provide the necessary flexibility to do so*, which I do not see possible under the proposed legislation.

Id. at 199 (emphasis added).

Likewise, R. R. Manion, a Vice-President of the Association of American Railroads, was testifying about the practical problems of H.R. 8449 as introduced. The portion of his testimony selectively quoted by the unions came from a section entitled "Deadheading Should Not Be Covered By The Hours-Of-Service Law." He testified

regarding the industry's particular concern that deadhead transportation from a duty assignment, after a crew had been relieved of all duties, not be treated as time on duty, as H.R. 8449 proposed. In fact, Congress agreed with the industry's concern, and the 1969 Amendments treated this deadhead transportation as limbo time, neither on or off duty.

Finally, the excerpt from the 1969 Senate Report which the unions cite deals with interim rest periods occurring during a train crews' tour of duty, not with time waiting for deadhead transportation at the end of a tour of duty. S. Rep. No. 604, 91st Cong., 1st Sess. *reprinted in* 1969 U.S.C.C.A.N. 1636, 1639.

Thus, Congress clearly understood in 1969 that time waiting for deadhead transportation by a relieved crew had historically not been treated as time on duty. When Congress intended in the 1969 Amendments to treat a previously unregulated time period as time on duty, it expressly did so, as in the case of deadhead transportation to a point of duty. Congress did not, however, classify time waiting for deadhead transportation from a duty assignment as time on duty in the 1969 Amendments. Any notion that Congress intended to do so is belied by its treatment of such deadhead transportation as limbo time.

B. The Seventh Circuit's Interpretation Is Consistent With Longstanding Administrative Application Of The HSA

The Seventh Circuit's interpretation was also in accord with the FRA's consistent application of the HSA for 25 years, before it temporarily veered off after *Skinner*. As this Court has observed, consistent long-standing application of a statutory term is an important indication of its meaning. *See, e.g., General Electric Co. v. Gilbert*,

429 U.S. 125, 141-42 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The unions try to kick dust in the Railroads' eyes on this point, claiming that "it is debatable what FRA's interpretation has been." Pet. Br. at 23. In fact, since the 1969 Amendments, the FRA's contemporaneous and consistent application of the HSA has been to count time waiting for deadhead transportation by a relieved crew as limbo time, and therefore not time on duty. The unions were well aware of this longstanding interpretation. For example, the UTU wrote to the FRA in 1977, expressly asking whether the HSA required that crews who had reached the twelve-hour maximum be immediately transported to their terminal. The FRA responded that the time waiting for deadhead transportation by such crews was limbo time. J.A. 62-63 ("[B]ecause no concrete detriment to railroad safety is ordinarily involved, FRA has traditionally viewed most delays associated with deadheading as part of time spent in deadhead transportation."). Even though the UTU official receiving this response testified before Congress in 1978, barely six months later, that the maximum hours of service should be further reduced from twelve to ten hours, the UTU did not raise this waiting time period as a concern. More than ten years later, in 1988, the UTU again wrote to the FRA on the same issue. The FRA responded with the same interpretation as set forth in its 1977 letter. J.A. 65-68 ("There is every reason to believe that Congress intended to include time spent awaiting deadhead transportation to the point of final release as part of the deadheading itself.").

Against this backdrop, the unions only cite the affidavits of "senior [FRA] management personnel" who "considered waiting time as time on duty." Pet. Br. at 23. As their own affidavits show, however, these individuals were really former lower level FRA employees. At least one

was also a former union official. Their affidavits were prepared in 1990, after they had left the FRA, in support of the unions' litigation against the FRA that culminated in the *Skinner* decision.[21/] The affidavits do not reference a single instance where the FRA ever actually assessed a railroad for violating the HSA by keeping a crew waiting for transportation. Indeed, read closely, these individuals are only expressing their own personal interpretation of the HSA, not that of the FRA.

C. Legislative History Subsequent To 1969 Confirms The Seventh Circuit's Decision

The Seventh Circuit's HSA interpretation is also supported by and consistent with subsequent amendments to the HSA. Since 1969, the HSA has been amended on six different occasions. On at least two such occasions, these unions proposed amendments that would directly or indirectly reduce the current twelve maximum hours of service. In 1978, the unions proposed that the maximum be reduced from twelve to eight hours. The Administration, as well as the industry, opposed this reduction, because it "would not allow any margin of error to accommodate the operational difficulties which are common in the [railroad] industry." *Railroad Safety Authorization For Fiscal Year 1979: Hearings Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 103 (1978) (testimony of John M. Sullivan, FRA Administrator). While Congress amended the HSA in

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21/ These affidavits were submitted by the unions in the *Skinner* litigation and are not part of the record in this case. Although not provided to this Court by the unions, the FRA submitted a counter-affidavit in that litigation by an actual FRA official.

1978, it declined the unions' proposal. *See Federal Railroad Safety Authorization Act of 1978*, Pub. L. No. 95-574, 92 Stat. 2459.

In 1991, these unions again proposed that the HSA be amended. Particularly relevant to this litigation, the unions urged amendment was necessary because "[e]mployees, at the end of a twelve-hour tour of duty, are being required to remain on trains many hours without being relieved." *Railroad Safety Programs, Hearings before the Subomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 252 (1991) [hereinafter *1991 Hearings*]; *see also id.* at 257, 259-60. The BLE there acknowledged that the "FRA's interpretation of HSA is that an employee who must remain on the engine after twelve hours and is subject to orders, but is not asked to provide any actual service, is considered to be on 'deadhead' time, which is neither 'on' nor 'off' duty." *Id.* at 260. Although clearly aware of the FRA's interpretation of the HSA, Congress declined to reclassify this waiting time.[22/]

The fact that Congress has not revised or repealed the FRA's consistent interpretation, especially after the unions specifically made an issue of that interpretation, is yet another indication that it is the interpretation intended by Congress. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) (quoting *N.L.R.B. v. Bell Aerospace Co.*,

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22/ *See also, e.g., Railroad Safety: Hearing Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 13, 45-48 (1987) (rejecting union-sponsored proposals to amend the HSA to limit the number of "tours of duty" an engineer could perform in any 30-day period and require that railroads provide engineers with 8 hour advance call time, because they would reduce unnecessarily the availability of train crews and hamper the flexibility of railroads to respond to operating necessities).

416 U.S. 267, 275 (1974)); *see also Traynor v. Turnage*, 485 U.S. 535, 546 (1988) (Congressional acquiescence is presumed from silence in face of an administrative practice or policy.).

III. The Seventh Circuit's Interpretation Is Consistent With Case Law

The unions argue that the Seventh Circuit's and Respondents' interpretation is contrary to case law of this and other courts. They are clearly wrong. The only cases ever to address whether the waiting time at issue here is limbo time under the HSA, as amended in 1969, are the Ninth and Seventh Circuit decisions.

This Court has never before addressed the issue presented by the unions' writ. The unions cite one early HSA decision by this Court, *Missouri, Kansas & Texas Railway v. United States*, 231 U.S. 112, 119 (1913). However, the narrow issue there was whether time spent waiting by a crew, while its locomotive was being serviced and repaired, was on duty time, when the crew would be called to resume operating the locomotive as soon as its servicing was completed. While waiting, the crew was "liable to be called upon at any moment." 231 U.S. at 112. The employees were "not at liberty to go away," because the railroad still required them to operate trains before they would be finally relieved from duty. In that case, the employees' "duty was to stand and wait" for further orders to resume operation of their train. *Id.* at 119. That is not the case here, where employees, having been relieved from all duties at the end of their tour, are not "liable to be called upon at any moment." This Court's decision in *Atchison, Topeka & Santa Fe Railway v. United States*, 244 U.S. 336 (1917), which was also cited by the Ninth Circuit in *Skinner*, did not even involve

the definition of on duty time. The only issue before the court was whether the railroad could justify the admittedly excessive service by coming within an exception in the HSA for delays caused by acts of God or other unforeseen events.

The unions put more weight on the observation that employees were "not at liberty to go away" in *Missouri, Kansas & Texas* than it will bear. For example, an employee in deadhead transportation is "not at liberty to go away," unless he wants to jump out of his deadhead transportation vehicle. Yet courts, including the Ninth Circuit, have held that such transportation was time off-duty, even though "it is true that [the employee] was not free to go where he pleased . . . ." *United States v. Great Northern Ry.*, 285 F. 152, 153 (9th Cir. 1922). The court focused on the fact that the employee had been released from all further train operating duties. *Id.* at 153.

Likewise, none of the other decisions cited by the unions involved the type of waiting time at issue here. In *United States v. Chicago, Milwaukee & Puget Sound Railway*, 195 F. 783 (D. Wash. 1912), the court held that time spent by train crew members preparing a train for departure and inspecting the train upon reaching its destination was to be counted as time on duty. This holding was unremarkable because the crew still had active duties relating to its train. Similarly, in *San Pedro, Los Angeles & Salt Lake Railroad v. United States*, 213 F. 326 (8th Cir. 1914), the railroad was found in violation of the HSA, when it gave additional duties to a fireman who already had reached the maximum hours of service operating a steam locomotive. While the train was stopped, the fireman was told to monitor the locomotive's boiler until the relief crew arrived; if the water level dropped below a certain point, the boiler could explode. The court had no difficulty finding that the fireman was

still on duty. The decisions in *United States v. Southern Pacific Co.*, 245 F. 722 (9th Cir. 1917) and *Northern Pacific Railway v. United States*, 220 F. 108 (9th Cir. 1914), both involved the issue whether the temporary release from duty, for short interim periods ranging from one hour to ninety minutes, after which the crew would be recalled to resume operation of its train, interrupted the calculation of the hours that a crew was continuously on duty. These cases held that such brief interim periods were to be counted as time on duty, because "[t]he run of the crew was not ended; it remained the crew of the train . . . ." 220 F. at 110. Again, that is not the circumstance here, where the crew has been relieved from all duties and is no longer the "crew of the train." Indeed, the unreported decision cited by the unions recognized that an employee is off duty when "he reaches the end of his run, *unless before reaching his destination* he is released from all service in connection with his train." *United States v. Northern Pac. Ry. Co.*, No. 2635 (W.D. Wash. 1914) (emphasis added), cited in Pet. Br. at 26.

In fact, in the 62-year history of the Act before the 1969 Amendments, no case held that time waiting for deadhead transportation by a crew finally released from duty was time on duty until the *Pennsylvania Railroad* decision in 1967. The lack of such cases for so many years, when the government was litigating the proper classification of various other time periods under the HSA, confirms that this waiting time period was not considered time on duty. The District Court in *Pennsylvania Railroad* concluded otherwise, because it misread this Court's decisions to require that all waiting time be counted as time on duty.

Like the District Court, the Ninth Circuit misread the HSA decisions of this Court, as well as its own. The Ninth Circuit concluded that "[t]he FRA's interpretation is

at odds with an unbroken line of decisions by the Supreme Court and by this circuit that waiting time is time on duty under the HSA . . . ." *Skinner*, 975 F.2d at 1426. The Ninth Circuit also concluded that "[w]ithout exception, the lower federal courts followed the Court's lead in holding that waiting time must be included in the calculation of an employee's time on duty . . . ." *Id.* However, as explained, neither of this Court's decisions cited by *Skinner* involved the issue of a relieved crew waiting for deadhead transportation.

The other decisions referenced by *Skinner* are the same ones relied upon here by the unions and likewise did not deal with time spent waiting for deadhead transportation by an expired crew. All were limited to whether meal periods and other "trifling interruptions" broke continuous service.[23/] Such periods were considered on duty time, because the employee had not been finally relieved from duty, could be recalled to duty at any moment, and had no opportunity to rest before being recalled. This was not true for a crew which had been relieved from duty after reaching the maximum limit. Such a crew had no further duties and could not be recalled to duty under the HSA until after the statutorily mandated rest period as previously explained.

The Ninth Circuit's characterization of its own decisions as holding "without exception" that any waiting time, regardless of circumstances, must be classified as on duty time under the HSA also was incorrect. 975 F.2d at 1426. The Ninth Circuit and other courts held that intermittent rest periods of three or four hours duration were off duty

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23/ *See, e.g., Chicago River I. & P. R.R. v. United States*, 253 F. 555 (8th Cir. 1918) (meal periods); *United States v. Chicago, M. & P. S. Ry.*, 197 F. 624 (E.D. Wash. 1912) (meal periods and indefinite delays with no rest).

time. *See, e.g., Southern Pac. Co. v. United States*, 222 F. 46 (9th Cir. 1915).

The Seventh Circuit's decision was fully consistent with this prior case law under the HSA. As the review of these cases shows, employees were considered to be on duty only if they had actual duties to perform in connection with the movement of a train or if they had been temporarily released from duty, but were subject to recall at any moment. Where a crew had been finally relieved from all duties, as is the case with a crew waiting for deadhead transportation, it was considered no longer on duty. In contrast, the Ninth Circuit's *Skinner* decision misread prior case law and was contrary to its own decisions. The Ninth Circuit's erroneous reading of case law was also its sole reason for not giving any deference to the FRA's longstanding treatment of this waiting time as limbo time. *Skinner*, 975 F.2d at 1426. Thus, the Ninth Circuit's opinion was also contrary to this Court's decisions that some deference is due to an agency's interpretation of a statute it administers, even though the agency lacks substantive rulemaking authority on the issue. *See, e.g., Reno v. Koray*, 115 S. Ct. 2021, 2027 (1995); *Martin v. O.S.H.R.C.*, 499 U.S. 144, 157 (1991).

IV. The Seventh Circuit's Interpretation Does Not Present A "Serious Safety Issue"

The unions also argue that this Court should favor the Ninth Circuit's interpretation of the HSA, because "there exists a serious safety issue which is directly impacted by the decision of the Seventh Circuit." Pet. Br. at 29. As identified by the unions, that safety issue is "irregularity of work shifts" and long work hours. *See* Pet. Br. at 29 ("long and irregular work hours"), 31 ("irregularity of work shifts"). The unions' safety issue lacks any support

in the record of this case or otherwise and must be addressed, if anywhere, to Congress.[24/]

With regard to the unions' complaint that train crews are required to work long hours, Congress has already made the legislative judgment, after repeated hearings, that a twelve-hour maximum work shift, followed by at least eight hours rest, is not excessive. The Seventh Circuit's decision does not alter this statutory scheme. If the unions believe there is a safety issue, "the appropriate vehicle for changing the Act is further legislation. Congress has spoken its mind on this matter, and if it changes its mind, it can amend the Act." *Peña*, 44 F.3d at 444.

The unions cite several general studies, newspaper articles, and anecdotes for the proposition that irregular work cycles contribute to stress and fatigue. Pet. Br. at 30-36. But, the HSA does not even regulate the regularity or time of day or night that a train crew can be called to work. Again, if the unions believe irregular work hours or disrupted bio-rhythms create a serious safety issue, then their recourse is to Congress. They should not make policy arguments to this Court seeking judicial amendment of the HSA through a re-interpretation of well-settled legislative terms.

In fact, the unions presented the identical safety arguments to Congress in 1991, where they sought the same result they are seeking here in this Court--reversal of the FRA's interpretation of time waiting for deadhead transportation as limbo time. The unions' brief on the merits to this Court bears a remarkable resemblance to, and in some places draws verbatim from, the BLE's prepared statement submitted to Congress in 1991. *Compare, e.g., 1991 Hearings* at 257-269 *with* Pet. Br. at

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24/ The unions can also seek changes in the hours of service of their members through collective bargaining. 49 U.S.C. § 21107.

19-24, 30-37. The same discussion of articles or testimony on sleep disorders or irregular work cycles by Dr. Charles Czeisler, Director of Circadian and Sleep Disorders, Michael K. Caplen, locomotive engineer, Dr. Donald I. Tepas, NTSB Chairman James L. Kolstad, and others is found in the unions' presentation to this Court as to Congress.[25/]

Not only are the unions pitching this safety argument in the wrong forum, they lack any support for their position. The HSA interpretation adopted by the Seventh Circuit is the one that the FRA continuously has applied since 1969. If the treatment of this waiting time as limbo time created a serious safety issue, surely someone would have noticed by now. In fact, the government conceded at the Seventh Circuit *en banc* argument that it had no evidence that treating this time period as limbo time had ever resulted in a train accident, prompting that Court to conclude that the FRA's changed interpretation (now embraced only by the unions) did not contribute to railroad safety. *Peña*, 44 F.3d at 444. Prior to this, the FRA had consistently opined that treating this waiting time as limbo time did not raise any "concrete detriment to railroad safety." J.A.

25/ While these articles on irregular work schedules were presented to Congress and this Court, they were not part of the administrative record in this case. As explained, the unions elected not to participate in the proceedings before the FRA which are the basis for these judicial proceedings. They waited to intervene until the case was before the Seventh Circuit and referenced these various materials for the first time in their appellate brief. This is an additional reason that the unions' supposed safety issue is not properly before this Court. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) ("[T]he focal point for judicial review should be the administrative record already in existence, not some record made initially in the reviewing court.").

63.[26/] None of the reports or newspaper articles on irregular work shifts concludes otherwise.

For these reasons, the serious safety issue contended by the unions is not a proper issue for this Court and provides no basis for overturning the Seventh Circuit.

CONCLUSION

The unions' arguments lack any merit and should be rejected. The Seventh Circuit's en banc decision should be affirmed.

Respectfully submitted,

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26/ This was also the FRA's position in *Skinner*. *See* Br. for Appellant at 18, *Brotherhood of Locomotive Eng'rs, et al. v. Skinner*, Nos. 91-35911 and 91-36061 (filed Nov. 12, 1991) ("the safety purposes of the Act are not implicated by the fact that [employees] remain under the railroad's supervision.").